ASIA COMMERCIAL FINANCE (M) BHD

v.

FENGHUA DEVELOPMENT SDN BHD & ORS

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[ORIGINATING SUMMONS NO: 31-710-88]
14 SEPTEMBER 2000

LAND LAW: *Charge - Order for sale - Notice of demand - Validity of Form 16A - Letter of demand and Form 16A issued on same date - Disparity in amount stated in Form 16A and in originating summons - Whether Form 16A valid - Order 83 r. 3 Rules of the High Court 1980 - Whether complied with - Whether order for sale to issue - National Land Code 1965, ss. 254(1), 256(3), 340 - Companies Act 1965, ss. 67, 67(6) - Rules of High Court 1980, O. 83 r. 3*

LAND LAW: *Charge - Order for sale - Cause to the contrary - Proof - Letter of demand and Form 16A issued on same date - Disparity in amount claimed in Form 16A and in originating summons - Whether constituted "cause to the contrary" - Actual amount due and owing set out in latest further affidavit - Whether O. 83 RHC complied with - National Land Code 1965, ss. 254(1), 256(3), 340 - Companies Act 1965, ss. 67, 67(6) - Rules of the High Court 1980, O. 83 r. 3*

CIVIL PROCEDURE: *Appearance - Memorandum of appearance - Memorandum of appearance filed after filing of certificate of non-appearance - Whether defendant precluded from putting in appearance subsequently - Preliminary objection - Notice to opponent - Preliminary objection raised without giving prior notice - Whether could be heard*

The defendant is the registered owner of three pieces of land with several shop lots built thereon ('the land'). On 24 September 1986, the defendant executed a third party charge over the land in favour of the plaintiff to secure a loan granted by the plaintiff to Aik-Aik Holding Sdn Bhd ('the borrower'). The defendant defaulted in the repayment, whereupon the plaintiff issued a notice in Form 16D and demanded payment of RM504,296.21 within 14 days. The defendant continued to default, and the plaintiff, hence, filed the present action to foreclose the land and realise the sum of RM6,043,409.75 under s. 254(3)(a) and (b) National Land Code 1965 ('the NLC'). Subsequently, to reflect partial satisfaction of the loan by the borrower, the plaintiff substituted the figure

RM6,043,409.75 with RM4,678,621.65. The correction, together with the breakdown of the actual sum owing, was made by the plaintiff through its latest further affidavit dated 10 August 2000 in purported compliance with O. 83 r. 3 Rules of the High Court 1980 ('RHC').

The defendant opposed the application for the order for sale, arguing that the Form 16D notice was invalid: (i) for not highlighting the breach or that the breach had continued for at least one month; (ii) for not giving a one-month notice as required by s. 254(1)(b) NLC; (iii) for bearing the same date as that of the letter of demand; and (iv) for claiming an amount different from that claimed in the originating summons. This apart, the defendant also contended that the charge was null and void and unenforceable as: (i) part of the loan was meant for the purchase of the defendant's shares in contravention of s. 67 Companies Act, 1965; (ii) the charge was *ultra vires* the defendant's memorandum and articles of association; (iii) there was misrepresentation by the plaintiff that the loan had been released to the defendant's solicitors.

Before the learned judicial commissioner, issues arose as to: (i) whether Form 16D herein was valid, and hence whether it has complied with the provisions of the NLC as well as the RHC; (ii) whether the defendant had shown "cause to the contrary" within the meaning of s. 256(3) NLC.

The facts further showed that, as a result of the defendant's failure to file a memorandum of appearance, a certificate of non-appearance was filed by the plaintiff on 12 January 1990. And thus, at the hearing of the present action on 17 August 2000, the plaintiff raised a preliminary objection that the defendant had no standing to be heard, and the court must of necessity grant the order for sale sought for. The defendant retorted that the objection ought to be dismissed as no prior notice had been given by the plaintiff in respect of same.

Held:

[1] The court could hear the preliminary objection although no prior notice had been given by the plaintiff. However, the plaintiff had by conduct waived the irregularity. The plaintiff had been filing affidavit upon affidavit and carrying on the case as though the defendant was properly on record. The period that elapsed, ie, ten years, is also unreasonably long and it would be prejudicial to the defendant to set aside the memorandum of appearance. Further, natural justice demands that the defendant's case be heard before the court determines the question of whether or not to make the order for sale. (p 98 d-g)

[2] "Cause to the contrary' within the meaning of s. 256(3) NLC may be established in three categories of cases, namely: (i) when a chargor brings his case within any of the exceptions to the indefeasibility doctrine in s. 340 NLC; (ii) when a chargor demonstrates that the chargee has not complied with the conditions precedent for making the application for an order for sale; and (iii) when a chargor demonstrates that the grant of an order for sale is contrary to some rule of law or equity. (pp 102 e, 103 g-i & 104 a)

[3] The contention that the Form 16D notice was invalid was without merits. The Form did state the breach in question, namely that the defendant had defaulted in the payment of RM504,296.21 and had also stated that the breach had continued for at least one month. As for the 14-day notice to remedy the breach, that was allowed by cl. 29 of the charge annexure which stipulated a minimum of seven days notice. (p 101 e-i)

[3a] There is no provision in the NLC that insists on a prior written notice of demand separate from that of Form 16D. Indeed, service of the Form 16D notice alone is sufficient to comply with s. 254 NLC. Hence, the fact that the Form 16D notice and the letter of demand bore the same date was immaterial and it did not render Form 16D invalid. Neither did it constitute "cause to the contrary". (p 106 d-e)

[3b] As to the disparity in the amount claimed between Form 16D and the originating summons, the principle is that, failure on the part of the chargee to state all the particulars as required by O. 83 r. 3(3) RHC in the very first affidavit is not fatal so long as "evidence of the correct amount due has been put before the final hearing" in a further affidavit and "if no real prejudice will thereby result to the defendant". (p 109 d)

[3c] Applying the principle aforesaid, since the amount claimed to be due and payable as of 17 August 2000 together with the detailed breakdown had been stated in the plaintiff's later further affidavit dated 10 August 2000, the provisions of O. 83 r. 3(3) RHC had been complied with by the plaintiff. In short, the plaintiff acted correctly when it claimed a sum of RM4,678,621.65 together with interest thereon upon the defendant's failure to pay a sum of RM504,296.21 as stated in the Form 16D notice and the disparity in the two amounts is allowed by s. 254(3)(a) NLC. The issue of disparity in the amounts claimed was without merits and did not constitute "cause to the contrary". (p 109 e-g)

[4] For misrepresentation to apply under s. 340(2)(a) NLC the defendant must show that the misrepresentation was fraudulent and that it arose before the charge was executed. In this case, the allegation that there was misrepresentation by the plaintiff was a bare allegation and therefore did not constitute "cause to the contrary". (p 111 e-g)

[5] Since the defendant had filed a separate action *vide* civil suit no. 22-251-92 for a declaration that the charge is null and void for contravening s. 67 of the Companies Act 1965 the relevant issue should be left to the trial judge in that suit to decide. (p 112 b)

[5a] In any case, as far as s. 256 (3) NLC read together with s. 340(2)(b) NLC is concerned, the charge is a valid and enforceable instrument since nothing was stated therein that a part of the loan was to be utilised to finance the purchase of shares in the defendant. (p 112 c-d)

[5b] Even assuming that the loan transaction here has infringed s. 67 of the Companies Act 1965 because part of the loan was to be used to enable the majority shareholders of the borrower to purchase shares in the defendant, the charge is saved by s. 67(6) of the Act. Section 67(6) is wide enough as to allow any person to recover the amount of any loan made in contravention of s. 67. It follows that the plaintiff is not prohibited from enforcing the said charge. It follows further that the defendant's allegation in this respect, even if true, did not constitute "cause to the contrary". (p 112 e-g)

[6] The allegation that the charge was *ultra vires* the defendant's memorandum and articles of association was a bare allegation. In any case, upon perusal of the defendant's memorandum of association, namely para. 3(5) read with para. 3(44) thereof, it was clear that the defendant was authorised to execute the said charge. (p 113 c-d)

[Order for sale granted.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 ***(refd)***

Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1990] 2 CLJ 35; [1990] 1 CLJ (Rep) 702 ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 AMR 369 ***(foll)***

Co-operative Central Bank Ltd (in receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 ***(refd)***

Datin Peggy Lilian Taylor v. Leong Yuet Yeng & Ors [1985] 1 CLJ 352; [1985] CLJ (Rep) 449 ***(refd)***

Datuk Jaginder Singh & Ors v. Tara Rajaratnam [1983] 2 MLJ 196 ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 ***(refd)***
Loke Yew v. Port Sweetenham Rubber Co [1913] AC 491 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***
Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 ***(refd)***
Malaysian International Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193 ***(refd)***
Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd & Anor [2000] 2 CLJ 73 ***(foll)***
Multi Purpose Bank Bhd v. Maimoon Abdul Razak [1999] 3 CLJ 21 ***(refd)***
Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 ***(foll)***
Perumahan Wira Seberang Sdn Bhd v. Hong Leong Finance Bhd [1999] 3 CLJ 56 ***(refd)***
Perwira Affin Bank Bhd v. Saad Abdullah & Anor [1999] 6 MLJ 418 ***(dist)***
Sii Toh Siong v. Hung Ming Chung [2000] 2 CLJ 41 ***(foll)***
Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd [1997] 1 CLJ 590 ***(refd)***
Yukilon Manufacturing Sdn Bhd v. Dato' Wong Gek Meng & Ors (No 2) [1997] 4 CLJ 209 ***(dist)***

Legislation referred to:
Companies Act 1965, ss. 67(1), (6), 133(1), (5)
National Land Code 1965, ss. 254(1), (3)(a)(b), 256(3), 340(2)(a), (b), 344(2)(b), form 16D
Rules of the High Court 1980, O. 2, O. 12 r. 5(2), O. 83 rr. 1(1)(b), 2(4), 3(3)

Other source(s) referred to:
Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia – Cases and Commentary*, 1995, 2nd edn, p 168

For the plaintiff - Ngan Siong Hing; M/s Abbas & Ngan
For the defendants - KW Chong; M/s Ngan & Tan & Partners, Jagjit Singh; M/s U Harcharan & Kerpal, Chitra Devi; M/s Concisom & Co, Gurbachan Singh; M/s Bachan & Kartar

Reported by WA Sharif

JUDGMENT

Su Geok Yiam JC:

This is an appeal against my decision given on 14 September 2000 granting an order for sale in favour of the plaintiff, in respect of the plaintiff's originating summons (encl. 2).

I had ordered that the remaining unsold units of shop lots (as listed in encl. 39) erected on lands held under Grant No. 10743 Lot No. 67D, CT No. 1022 Lot No. 68 and Grant No. 9332 Lot No. 1146, all in the town of Teluk Intan together with the three pieces of land (hereinafter referred to as "the said lands") be sold, subject to the consent order recorded on the same date as between the plaintiff and three other parties, namely, Aik-Aik Holding Sdn. Bhd., Loyal Impact (M) Sdn. Bhd. and Angkutera Sdn. Bhd., by way of public auction for the realisation of the sum of RM4,678,621.65 owed to the plaintiff as at 17 August 2000 with interest thereon at 11.45% per annum thereafter until full realisation.

In this case the plaintiff, Asia Commercial Finance (M) Berhad, which is also the chargee, is a finance company and the defendant, Fenghua Development Sdn. Bhd., which is also the chargor, is the registered owner of the said lands.

Facts And Background

On 24 September 1986 the defendant executed a third party charge over the said lands under charge presentation No. 17046/86 Volume 2146 Folio 11 (hereinafter referred to as "the said charge") in favour of the plaintiff to secure a fixed loan facility for a sum of RM5,400,000 advanced by the plaintiff to one Aik-Aik Holding Sdn. Bhd. (hereinafter referred to as "the borrower") with interest thereon at the rate of 3.5% per annum above the base lending rate of 12% and calculated on monthly rests or at such other rate as the plaintiff acting in accordance with the provisions of the said charge might require the defendant to pay.

The defendant undertook to repay on demand the loan together with the interest charged thereon.

When the defendant defaulted on the loan, thus breaching the terms of the said charge, the plaintiff through its solicitors, Messrs. Abbas & Ngan, sent to the defendant a notice in Form 16D of the National Land Code (hereinafter referred to as "the NLC") dated 16 April 1988. In the notice it is clearly stated that the amount claimed is RM504,296.21 as at February 1988 and that if the amount is not paid within 14 days from the service of the notice the plaintiff will apply for an order for sale.

The Form 16D notice was served on the defendant at the defendant's registered address by way of A.R. registered post (exhs. "WYM2" and "WYM3", respectively). When the defendant continued to default payment, the plaintiff filed this action on 30 July 1988 against the defendant to foreclose the said lands in order to realise the sum of RM6,043,409.75 (as at 30 April 1988) with interest thereon chargeable at the rate of 4% per annum above the base lending rate.

On 21 May 1992 the defendant applied by way of summons-inchambers (encl. 17) to transfer this originating summons to High Court No. 2 Ipoh for it to be jointly heard with another proceeding, ie, Civil Suit No. 22-278-89, on the ground that the issues in this originating summons were related to those in that civil suit and that it was more suitable for both matters to be heard together in one court.

The defendant filed an affidavit (encl. 16) and another affidavit (encl. 20) together with a document under the heading "points of claim" (exh. "KK1") in support of its application.

On 2 October 1992 when the matter came up for hearing the plaintiff opposed the defendant's application on the ground that it was an abuse of the process of court because the two proceedings were based on entirely different causes of action. Civil Suit 22-278-89 was filed by one Poh Leong Sdn. Bhd. and others against the defendant arising from an agreement (hereinafter referred to as "the said agreement") entered into between the said parties whereas this originating summons was filed by the plaintiff against the defendant to obtain an order for sale.

A copy of the said charge and a copy of the said agreement for the sale and purchase of 80,000 shares in the defendant between Hartawan Sdn. Bhd. on the one part and Poh Leong (M) Sdn. Bhd. and Hock Sing Enterprise Sdn. Bhd. on the other part were exhibited in the plaintiff's affidavit-in-reply (encl. 18) to the defendant's application.

Ong See Seng, J dismissed the defendant's application with costs. As the defendant has not appealed against his decision it must mean, therefore, that the defendant has accepted that the issues in this originating summons are different from those in Civil Suit No. 22-278-89.

In its first affidavit-in-reply (encl. 31) filed on 30 June 1995 to the plaintiff's originating summons (encl. 2) the defendant has adopted each and every paragraph of the "points of claim" mentioned earlier, and also reiterated that the plaintiff was, at the very outset, aware of the purpose of the said loan which was partly for the purchase of the shares of the defendant (the amount was not stated) and partly to finance the construction of a complex, namely, the Aik-Aik Complex (hereinafter referred to as "the said complex") and that the said charge contravened s. 67 of the Companies Act 1965 and was, therefore, null and void and that the defendant has filed an application *vide* Civil Suit No. 22-251-92 for a declaration that the said charge is null and void and the same has not been heard by the court yet.

The defendant has also denied the particulars of the amount outstanding as stated in para. 2 of the plaintiff's further affidavit filed on 17 June 1995 (encl. 29) and has put the plaintiff to strict proof. According to the defendant the plaintiff has not shown any ledger or statement of account as to how the figures were derived. The defendant referred to the repayment column which was left blank and contended that it was quite impossible since a substantial number of the units on the ground, first and second floors of the said complex were sold by the borrower and the plaintiff also gave loans to the purchasers of those units.

In reply, the plaintiff in its affidavit filed on 12 July 1995 (encl. 33) has stated that there are no merits in the "points of claim" including the defendant's assertion that when the plaintiff processed the loan application of the borrower the plaintiff already knew that the purpose of the loan was to finance the purchase of the defendant's shares.

Neither was the plaintiff concerned with the private arrangements of the defendant, ie, the sale of its shares to the two majority shareholders of the borrower in order to enable the borrower to acquire interests in the said lands; the five sale and purchase agreements dated 12 October 1984 which were alleged by the defendant to have been entered into between the defendant's shareholders on the one part, namely, Hartawan Sdn. Bhd., Ngan Property Sdn. Bhd., Merriland Development Sdn. Bhd., Kok Ching Loong and Lim Ah Ooi and the two majority shareholders of the borrower on the other part, namely, Poh Loong (M) Sdn. Bhd. and Hock Sing Enterprise Sdn. Bhd.; and the payment by the latter of 25% of the loan to the defendant in consideration of the creation of the said charge by the defendant in favour of the plaintiff.

Further it was only an assumption on the defendant's part that the plaintiff knew or had knowledge of the transactions entered into between the defendant and the two majority shareholders of the borrower.

As for the defendant's contention that the said charge contravenes s. 67 of the Companies Act 1965 and that the defendant is not authorised to execute a third party charge the plaintiff replied that both are irrelevant issues raised to delay the plaintiff's application.

In a second affidavit-in-reply (encl. 36) opposing the plaintiff's application for an order for sale, the defendant reiterated that a part of the loan was for the finance of the shares in the defendant and that the accounts which were provided by the plaintiff in its originating summons (encl. 2) were not accurate. Further, there was the ruling by the Supreme Court in Civil Suit No. 22-278-1989 that all the payments received from the various purchasers (of the units in the said complex) are to be deposited with Messrs. Bachan & Kartar, the

solicitors for the borrower who were ordered to release the same, *inter alia*, for redemption. The defendant relied on a statement of account (exh. "TLH2") enclosed in a letter sent by Messrs. Bachan & Kartar, the borrower's solicitors, in which it was clearly stated that a sum of RM8,000 was utilised for payment to the plaintiff for redemption to show that the particulars furnished by the plaintiff in its further affidavit filed on 1 August 1995 (encl. 35) were inaccurate because there was a possibility that further payments had been made before and after the said Supreme Court Order which were not taken into account by the plaintiff.

In reply, the plaintiff in its affidavit filed on 17 November 1995 (encl. 38) stated that the defendant had never complained about the inaccuracy of the amount claimed until the plaintiff instituted the foreclosure proceeding and that the challenge by the defendant is merely to delay the foreclosure proceeding.

The plaintiff has denied that a part of the loan granted to the borrower was to finance the purchase of the shares in the defendant.

Further paras 8, 9, 10, 11 and 12 of the defendant's affidavit (encl. 36) which concern the dispute between the borrower and the defendant which resulted in the filing of Civil Suit No. 22-278-1989 and the dispute between the borrower and the purchasers of the units in the said complex are irrelevant.

It is noteworthy that subsequent to its further affidavit (encl. 29), the plaintiff filed a total of five further affidavits, ie on 26 July 1995 (encl. 34), on 1 August 1995 (encl. 35), on 2 October 1995 (encl. 37), on 22 June 2000 (encl. 56) and on 10 August 2000 (encl. 56A), respectively, setting out the amount which was due and owing by the defendant.

The plaintiff's latest further affidavit (encl. 56A) which was affirmed by the plaintiff's manager, Toon Kooa Choy, clearly states that the amount payable as at 17 August 2000 was RM4,678,621.65 after taking into account repayment of a sum of RM3,848,244 together with interest thereon at the rate of 11.45% per annum until full realisation. Paragraphs 3 and 4 of the affidavit are crucial and are reproduced below:

> 3. Setelah menyemak rekod Plaintif mengenai akaun Defendan, saya mengesahkan bahawa baki pinjaman keseluruhan hutang termasuk faedah yang perlu dibayar oleh Defendan kepada Plaintif menurut gadaian untuk Pinjaman setakat 17/08/2000 adalah sebanyak RM4,678,621.65 dengan faedah seterusnya dikirakan pada kadar 11.45% setahun sehingga penyelesaian penuh.
>
> 4. Maklumat keseluruhan hutang seperti mengikut Aturan 83 Kaedah 3 Kaedah-Kaedah Mahkamah Tinggi 1980 adalah seperti berikut:

Pada 17/08/2000

a) Amaun pendahuluan	RM 5,400,050.00
b) Amaun faedah terakru	RM 1,809,506.19
c) Amaun pembayaran semula (jika ada)	RM 3,848,244.00
d) Amaun tunggakan ansuran	RM 4,678,621.65
e) Amaun tunggakan faedah	RM 1,809,506.19
f) Lain-lain caj	RM 427,628.93
g) Amaun belum berbayar mengikut gadaian	RM 4,678,621.65
h) Kadar faedah	11.45%

Although the defendant has challenged the amount stated in the plaintiff's supporting affidavit and previous further affidavits, the defendant has not filed any affidavit-in-reply to challenge or dispute the amount due and owing by the defendant in the plaintiff's latest further affidavit filed on 10 August 2000 (encl. 56A).

As the borrower had already sold some of the units in the said complex, with the knowledge and agreement of the plaintiff, it came to pass that three applications were filed, one each by the borrower (encl. 41), Loyal Impact (M) Sdn. Bhd. (hereinafter referred to as "the second intervener") (encl. 43) and by Angkutera Sdn. Bhd. (hereafter referred to as "the third intervener") (encl. 44) to intervene as defendants in this proceeding in order to oppose the plaintiff's application for an order for sale.

In its application (encl. 41) the borrower claimed to be the agreed or appointed developer of the said lands. It had taken a bridging loan of RM5.4 million from the plaintiff to develop the said complex which comprised a four storey shopping cum office complex with a total of 111 units. Some of the units in the said complex had been sold to individual purchasers with the express agreement and consent of the plaintiff and all the purchase prices of the sales had been paid to the plaintiff and that the plaintiff was therefore estopped from forclosing the units purchased by the individual purchasers.

In its application (encl. 43) the second intervener claimed to be the purchaser of one of the 111 units, ie unit No. A2/16B, from the borrower.

In its application (encl. 44) the third intervener claimed to be the purchaser of 4 of the 111 units, ie, units A1/98, A2/9B, A2/15A and A4/9C, respectively, from the borrower.

Both the second and third interveners claimed that the foreclosure proceeding should not be allowed to go on until the claims of the borrower against the defendant in Civil Suit No. 22-278-89 have been disposed of because they were ready at all times to pay the balance of the purchase prices to the borrower in order to complete their obligations *vis-a-vis* the defendant so that the borrower would then obtain the strata document of title to the respective units for both the second and third interveners.

On 11 October 1999, Clement Skinner JC (as he then was) allowed order-in-terms of the second intervener's and the third intervener's applications to intervene as defendants. On 10 May 2000, his Lordship also granted order-in-terms of the borrower's application to intervene, also, as a defendant. The reason why the borrower's application although filed first in point of time was not disposed off until 10 May 2000 was because the borrower was wound-up before its application could be heard and thereafter there was a delay in getting the sanction of the Official Assignee.

Thus when the foreclosure proceeding came up for hearing before me on 17 August 2000, the borrower and the two interveners were already in the picture and their respective interests in the said lands were clearly set out in their supporting affidavits (encls. 42, 44 and 45). On the day of the hearing, however, Mr. Gurbachan, learned counsel for the borrower informed the court that the plaintiff and the borrower and the two interveners had agreed that all those lots which had been sold by the borrower be excluded from the public auction.

A draft consent order to that effect had been prepared and it was agreed by the plaintiff on the one part and the borrower and the two interveners on the other part that the latter would give a list of the lots sold and unsold to the court in two week's time for purposes of verification failing which either party was at liberty to apply to the court for the court's determination. Upon their request the court recorded a consent order to that effect, thereby, leaving only the plaintiff's application for an order for sale of the said lands against the defendant to be heard and determined by the court.

At the outset of the hearing the defendant raised a preliminary objection. Mr. Ngan, learned counsel for the plaintiff, objected to Mr. Chong appearing for the defendant on the ground that he had no *locus standi* to do so. This was because the plaintiff had filed a certificate of non-appearance (encl. 11) on 12 January 1990, ie after the affidavit of posting was filed on 7 December

1989 (encl. 10). It was only subsequently that the defendant filed a memorandum of appearance, ie on 8 August 1990 (encl. 14), without the leave of the court. Consequently, the plaintiff prayed for the remaining unsold units (as stated in encl. 39) to be sold by public auction without giving an opportunity to the defendant to be heard in its own defence.

Mr. Chong replied that it was a new issue and that he was taken by surprise. The learned plaintiff's counsel had not informed him earlier that such an objection would be made on the day of the hearing.

In any event, he submitted that the learned plaintiff's counsel had by his conduct waived the irregularity because the plaintiff had filed affidavits-in-reply to the defendant's affidavits filed subsequent to the filing of the memorandum of appearance by the defendant.

In reply, Mr. Ngan submitted that there is no provision for waiver in the rules.

In answer to the court's query, Mr. Ngan explained that the plaintiff did not proceed to apply for order-in-terms of its application for order for sale (encl. 2) after it had filed the certificate of non-appearance because by consent the parties had agreed to delay its application until the resolution by the Supreme Court in another proceeding, ie, Civil Suit No. 22-278-89, which dealt with the merits of the claim by the borrower against the defendant and the plaintiff was not a party to that suit.

Mr. Ngan also informed the court that as the Supreme Court has since given its decision (encl. 40) in favour of the borrower *vis-a-vis* the defendant, the plaintiff is proceeding with its application against the defendant for an order for sale of the said lands under s. 256 of the NLC.

Mr. Chong has relied on O. 2 of the RHC in support of his submission that an application to set aside for irregularity should be made within a reasonble time and before a fresh step is taken. Here, the irregularity had taken place some ten years ago.

Further the plaintiff did not apply to set it aside as is required under the RHC. Subsequent to that the defendant had filed affidavits and the plaintiff had replied to those affidavits. By the conduct of the plaintiff in carrying on with the case as though the defendant was properly on record the plaintiff had waived the defendant's irregularity. Further the plaintiff's application for an order for sale had been fixed many times for hearing but there was no objection raised until 17 August 2000. If the plaintiff's preliminary objection was allowed it would cause prejudice to the defendant.

The learned counsel for the plaintiff cited three cases in support of his preliminary objection, ie, *Yukilon Manufacturing Sdn Bhd v. Dato' Wong Gek Meng & Ors (No 2)* [1997] 4 CLJ 209, *Sii Toh Siong v. Hung Ming Chung* [2000] 2 CLJ 41 and *Datin Peggy Lilian Taylor v. Leong Yuet Yeng & 2 Ors* [1985] 1 CLJ 352; [1985] CLJ (Rep) 449.

In my opinion the *Yukilon* case can be distinguished because it concerns a change of solicitors. It is trite law that a limited company can only enter an appearance by its solicitors. Accordingly, the memorandum of appearance which was filed in this case by Messrs. Ngan & Tan, the solicitors for the defendant, was to allow the defendant to challenge the proceeding and be heard in its defence. There was no change of solicitors at all.

The case of *Sii Toh Siong v. Hung Ming Chung* [2000] 2 CLJ 41 is applicable on the issue whether the failure by one party to give prior notice to the other party of its intention to raise a preliminary objection would disentitle the former from raising the preliminary objection at the trial. I share the same view as his Lordship Tee Ah Sing, J in that case. Accordingly, I was of the opinion that I could hear the preliminary objection in this case although no prior notice had been given by Mr. Ngan, learned counsel for the plaintiff.

As for the *Datin Peggy Lillian Taylor* case, I am of the view that it is inapplicable here because it concerns the procedure for setting aside default judgments and the writ of summons. It does not concern non-compliance of O. 12 r. 5(2) of the RHC and the effect of such non-compliance under O. 2 of the RHC.

In the ultimate analysis the court was of the view that the plaintiff had waived the irregularity by its conduct in filing affidavit upon affidavit and replying to the defendant's affidavits-in-reply and carrying on the case as though the defendant was properly on record. The period which has elapsed, ie ten years, is an unreasonably long time and the defendant would suffer serious prejudice if its memorandum of appearance (encl. 14) was set aside. The court, therefore, overruled the plaintiff's preliminary objection.

Quite apart from the issues of irregularity and waiver, in the light of the decision by the Federal Court in *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 2 CLJ 586, the court was of the view that the defendant had a right to be heard through its counsel, Mr. Chong, because of the fundamental rule of natural justice as expressed in the Latin *maxim audi alteram partem* (hear the other side) which is statutorily enunciated in O. 83 r. 2(4) of the RHC.

In an earlier case, *Citibank NA v. Ibrahim b Othman* [1994] 1 AMR 369, Mahadev Shankar, J in distinguishing the case of *Asia Commercial Finance (M) Bhd. v. Kimden Housing Development Sdn Bhd* [1993] 1 CLJ 487 had said as follows, at p. 379:

> The real basis of that decision was that there was a total failure to serve the defendant with notice of appointment for the adjourned hearing. There was thus a deprivation of the right of being heard. The proceedings were therefore a nullity. (See passages at p 363). **In this respect the law appears to give the defendant a second chance to put in an appearance.** (The emphasis added.)

I subscribe to his views.

Applying that case to the facts of the present case, I am of the view that the failure of the defendant to file a memorandum of appearance did not preclude the defendant from putting in an appearance on 17 August 2000 (when the originating summons (encl. 2) was fixed for hearing) in order to be heard in its own defence and the court was under a duty to hear the objections of the defendant, if any, before making the order for sale against the defendant.

Whether Order For Sale Should Be Granted

I shall now consider whether an order for sale should be granted to the plaintiff. In doing so I have to concern myself with three issues, ie whether the plaintiff has duly served the Form 16D notice on the defendant, whether the plaintiff has complied with the procedure as set out in O. 83 of the RHC and lastly whether the defendant has succeeded in showing "cause to the contrary" under s. 256 of the NLC.

The principles governing an application under O. 83 r. 1(1)(b) of the RHC for an order for sale of charged land have been clearly spelt out in the Federal Court case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 at p. 51:

> A Judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

Service Of The Form 16D Notice

The plaintiff in para. 5 of his supporting affidavit (encl. 1) has averred that he had caused a "notice in Form 16D of the National Land Code dated 16 April 1988 to be served under A. R. Register(ed) Post and Certificate of

Posting on the defendant". A copy of the covering letter together with the Form 16D notice and the A. R. Registered card were annexed to and exhibited in his supporting affidavit.

The defendant has not denied this averment in its two affidavits-in-reply (encls. 31 and 36) and thus, I found that the Form 16D notice had been duly served on the defendant.

Validity Of The Form 16D Notice And Compliance With O. 83 Of The RHC

The learned defendant's counsel has sought to rely on an affidavit-in-reply by one Tan Leong Heng, ie, the chairman of the defendant, affirmed on 11 February 1991 and served after the service of the originating summons, the contents of which were not disclosed to the court. As it turned out, although the learned plaintiff's counsel had a copy of the affidavit-in-reply in his file, the learned defendant's counsel had no proof of filing. I searched the two court files but could not find the affidavit-in-reply. The court then allowed the learned defendant's counsel to go through the two court files in order to trace the affidavit. Having done so, he informed the court that it was not in the two court files.

The court agreed with the learned plaintiff's counsel's submission that since the affidavit concerned was not in the court files and there was no proof of filing, the document was not before the court. Further, a check by the court of the index of the documents filed in the two court files showed that there was no record made whatsoever that such an affidavit had in fact been enclosed in the two court files. In the premises, the court disallowed the learned defendant's counsel from placing any reliance on the affidavit.

The learned defendant's counsel then proceeded to submit that the notice in Form 16D was invalid on the following grounds:

(a) the breach was not stated in the Form 16D notice;

(b) there was nothing to show that the breach had continued for at least one month before the issuance of the Form 16D notice;

(c) the Form 16D notice only gave the defendant 14 days from the date the Form 16D notice was served to remedy the breach, assuming there was such a breach, instead of one month as the said charge did not specify a shorter period;

(d) the letter of demand and the Form 16D notice were dated the same day;

(e) there is a great disparity between the amount claimed in Form 16D, ie, RM504,296.61 and the amount claimed in para. (a) of the plaintiff's

originating summons, ie RM6,043,409.75 and the plaintiff has not rendered accounts in their affidavit to show how the figures were derived.

In order to determine the issues raised by the defendant the court has to examine the relevant law which is applicable. In this case the law applicable is the NLC and the RHC. Under s. 254(1) of the NLC where a breach of agreement has continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in form 16D specifying the breach in question, requiring it to be remedied within one month of the date on which the notice is served or such alternative period as may be specified in the charge and warning the chargor that if the notice is not complied with, he will take proceedings to obtain an order for sale. The breach may relate to default in payment of principal or interest or both. Under s. 254(3) of the NLC if at the expiry of the period specified in any such notice the breach in question has not been remedied the whole sum secured by the charge shall become due and payable to the chargee and the chargee may apply for an order for sale (*National Land Code, A Commentary* by Judith Sihombing, 1981).

Having perused the Form 16D notice, the plaintiff's supporting affidavit (encl. 1) and the plaintiff's latest further affidavit (encl. 56A) the court found as follows:

(a) the breach was stated in the Form 16D notice, ie the defendant had defaulted in payment of a sum of RM504,296.21 as at February 1988;

(b) as stated in the notice itself, the breach has continued for a period of at least one month prior to the date of the notice, ie prior to 16 April 1988;

(c) the defendant was required to remedy the breach within 14 days of the date on which the notice was served, ie by 30 April 1988 and this was allowed under cl. 29 of the charge annexure which allows a minimum of seven days notice and there was a warning in the notice itself that if the chargor should fail to comply with the notice the plaintiff would take proceedings to obtain an order for sale.

With regard to issues (d) and (e) as set out above the court will deal with them later under the headings "cause to the contrary", "Form 16D notice and letter of demand dated the same day" and "disparity in amount claimed, inaccuracy of demand and failure to render accounts" in order to avoid overlapping and repetition.

Suffice to say for now that with regard to the defendant's contention that the Form 16D notice is invalid on the ground that the period for the remedy of the breach as stated therein is less than one month, being only 14 days, the

court found that this ground was without merits because there is a clause, ie cl. 29, in the charge annexure which clearly allows the plaintiff to do so.

Clause 29 provides as follows:

> **BREACH OF COVENANT**
>
> 29. In the event of any breach of the Chargor(s) and/or the Borrower of any of the agreements covenants terms stipulations and undertakings herein provided and on the part of the Chargor(s) and/or the Borrower to be observed and performed (including the agreement or covenant to pay the sum for the time being owing to the Chargee on demand as aforesaid) occuring and continuing for a period of not less than seven (7) days and service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided or as may be prescribed by the National Land Code.

"Cause To The Contrary"

In the *Low Lee Lian* case *(supra)*, Gopal Sri Ram, JCA when delivering the judgment of the Federal Court had given the following interpretation of the expression "cause to the contrary", at pp. 44 to 46:

> In our judgment, 'cause to the contrary' within s. 256(3) may be established only in three categories of cases.
>
> First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the Code establishes cause to the contrary. That section provides as follows:
>
> 340 (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s. (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or, any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss. (2) and (4)(b) above will be held to have established cause to the contrary under s. 256(3). The decision of Smith J in *Subchent Kaur v. Chai Sau Kian* [1958] MLJ 32, of the former Federal Court in *Phuman Singh v. Kho Kwong Choon* [1965] 2 MLJ 189, of Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124 and that of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.

Secondly, a chargor may show cause to the contrary within s. 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v. Letchumanan Chettiar* [1939] MLJ 296 at p 298 where he said:

> I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

The Federal Court's interpretation of the phrase "cause to the contrary" of the judgment is well summarised in the headnotes under as follows:

> Held, dismissing the appeal:
>
> (1) 'Cause to the contrary' within s. 256(3) of the Code might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

The Federal Court then went on to emphasise at p. 50, as follows:

> ... unless a chargor can bring himself within one of the categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale.

I shall now deal with issues (d) and (e) mentioned earlier and also the following four other issues which were raised by the defendant in its two affidavits-in-reply, affirmed on 29 June 1995 (encl. 31) and 14 August 1995 (encl. 36), respectively, and which have been referred to earlier by the court when setting out the facts and background of the case in order to determine whether the defendant has succeeded in showing "cause to the contrary":

(i) the said charge is null and void because the plaintiff induced the defendant to believe that all progressive releases of the said loan had been released to the defendant's solicitors, Messrs. Ngan & Tan by representing to the defendant that sufficient funds would be available for the completion of the construction of the said complex on the said lands. The plaintiff also represented to the defendant that all such progressive releases of the said loan amounting to 70% of the progressive claims made by the borrower's architects are to be released to the said solicitors when the plaintiff knew that it was not to be so.

(ii) the said charge is null and void and unenforceable because part of the loan granted to the borrower was to be used to finance the purchase by one Poh Leong (M) Sdn. Bhd. and one Hock Sing Enterprise Sdn. Bhd. (both majority shareholders of the borrower) of all the defendant's issued shares (80,000) which is against s. 67 of the Companies Act 1965;

(iii) the said charge is null and void and unenforceable because the defendant's company is not empowered under its memorandum and articles of association (exh. "TLH5") to create a third party charge;

(iv) the plaintiff has committed breaches of the said charge by allowing part of the said loan to be used by the borrower for the payment of stamp duty on the said charge, settlement of legal fees payable to the plaintiff's solicitors, payment of interest due and payable to the plaintiff by the borrower and payments of interest due and payable to other companies related to the borrower. The plaintiff also allowed one Ong Ah See to utilise part of the said loan for his own personal use and for the use of the borrower.

Applying the principles relating to the three categories of cases which would constitute "cause to the contrary" in foreclosure proceedings as enunciated by Gopal Sri Ram, JCA in the *Low Lee Lian* case *(supra)* to the present case the court found as follows:

Form 16D Notice And Letter Of Demand Dated The Same Day

In *Multi Purpose Bank Berhad v. Maimoon binti Abdul Razak* [1999] 3 CLJ 21, the first of three issues which came up for determination by the High Court, Kuala Lumpur was whether a letter of demand should precede the service of a Form 16D notice. James Foong, J said that he saw no merits in the contention by the defendant that a letter of demand should precede the service of the Form 16D notice although counsel for the defendant had cited the following passage from the Federal Court judgment of Gopal Sri Ram JCA in *Low Lee Lian v. Ban Hin Lee Bank Bhd. (supra)*, at p. 45:

> Failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute a cause to the contrary.

and to which his Lordship had held as follows:

> There is no provision in the NLC which insists on a prior written notice of demand separate from that of Form 16D before the issuance of this statutory notice. And even reading the above phrase of the Federal Court, I cannot find any indication of such a prerequisite. The conjunctive word 'or' is used between "the making of a demand" and "service upon the chargor of a notice in Form 16D." Thus when the latter is carried out it is sufficient by law to fulfill the making of a demand on the chargor before commencement of a foreclosure action. In this case, Form 16D was used and was duly served on the defendant thereby amply satisfying the requirement under s. 254(1) of the NLC.

I subscribe to his views.

It follows, therefore, that the argument by Mr. Chong, learned counsel for the defendant, that Form 16D was invalid because it was dated the same date as the letter of demand is without merits because service of the Form 16D notice alone was sufficient to comply with s. 254 of the NLC and service of a separate prior letter of demand was unnecessary. Thus, the fact that both the Form 16D notice and the letter of demand bore the same date was immaterial and it did not render the Form 16D notice invalid. Neither did it constitute "cause to the contrary".

Disparity In Amount Claimed, Inaccuracy Of Demand And Failure To Render Accounts

The defendant has relied on the case of *Perwira Affin Bank Bhd v. Saad bin Abdullah & Anor* [1999] 6 MLJ 418 in support of his proposition that the Form 16D notice was invalid because there is a great disparity in the sum stated in the Form 16D notice and in the originating summons.

In that case Faiza Tamby Chik, J had dismissed the plaintiff's application for an order for sale on the ground that the burden was on the plaintiff to show that the Form 16D notice was issued in accordance with the charge and the plaintiff had failed to do.

In my view the facts of that case can be distinguished from the facts in the present case. In that case the learned judge found as a fact that the principal sum secured under the two charges was RM80,000 and RM50,000, respectively. The total principal secured was, therefore, RM130,000, yet the sum stated in a letter of demand sent prior to the Form 16D notice was RM540,593.63. Therefore, the alleged claim of principal and interest clearly exceeded the sums secured under the terms of the charge annexure. The Form

16D notice did not specify the breach but instead referred to the letter of demand. The plaintiff in its subsequent affidavit had split the amount into two, one of which was for the principal sums due under the two charges as RM80,000 and RM50,000 with alleged interest and expenses totalling RM147,610.58 and the other was for principal sums allegedly owed by the borrower as RM350,000 with interest and other expenses totalling RM634,884.33. The learned judge held that this was an admission on the part of the plaintiff that the sum demanded in the letter of demand and the Form 16D notice was not the sum secured under the two charges. It was because of this that the learned judge had held as follows, at pp. 428 and 429:

> It was not merely a question of inaccuracy in the demand but it was a question of whether a demand by the plaintiff was pursuant to the terms of the charges. Failure to comply with the terms of the charge annexure went to the root affecting the validity of the demand.
>
> *Mediservices Pty Ltd* is a case to show what was the effect of not specifying the particular default. This by analogy was similar to our s. 254(1)(a) of the Code which requires 'specifying the breach in question.' If the plaintiff can demand all and sundry, then what was the meaning of 'specifying' in our Code and what was the meaning of the words 'up to sum of dollars ... only for principal ...' and 'moneys intended to be hereby secured' as stipulated under the charge annexure. The effect of excessive demand, ie asking for something which the plaintiff was not entitled to was shown in the case of *Co-operative Central Bank.*

In the present case the amount as specified in the Form 16D notice, ie RM504,296.21 as at February 1988, did not exceed the amount of the loan of RM5,400,000 which loan amount has not been disputed by the defendant. When the defendant defaulted on this notice, the plaintiff in accordance with s. 254(3)(a) and (b) of the NLC brought the originating summons to recover the total amount due and payable under the said charge inclusive of interest, ie RM6,043,409.75.

The two provisions of the NLC read as follows:

> 254(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied:
>
> (a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and
>
> (b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter.

In the plaintiff's latest further affidavit filed on 10 August 2000 (encl. 56A) the amount claimed as at 17 August 2000 is RM4,678,621.65 after taking into

account payment of RM3,949,244. The defendant has not challenged this amount by filing any affidavit-in-reply unlike in the *Perwira Affin Bank* case *(supra).*

In *Citibank NA v. Ibrahim Othman (supra)* (the reasoning of which was endorsed by the Federal Court in *Maimunah bte Megat Montak v. Mayban Finance Bhd* [1996] 3 CLJ 9) Mahadev Shankar, J has said as follows, at p. 379:

> Defence counsel submitted on the authority of *Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd* [1993] 1 CLJ 487, that if all the required statutory particulars are not contained in the very first affidavit filed in support of the originating summons, there is a "fundamental breach" which is incurable and the entire proceedings are thereby rendered nugatory.
>
> The concept of "fundamental breach" is one peculiar to non-performance of obligations which goes to the root of a contract, and I am not sure how appropriate it is in the present context. With respect to defence counsel, I do not think that this case supports the proposition he advanced.
>
> ...
>
> As much as the verb "must" appears in Order 83 r. (3)(a) so does the verb "shall" appear in Order 2 r. 1 whereby the failure to comply with any Rules of the High Court shall not nullify the proceedings. So one must ask oneself what the objective of Order 83 r. 3(3) was. It is to tell the defendant how much precisely is being claimed so that he can make up his mind to contest or pay-up.
>
> ...

and at p. 380:

> ...
>
> What the chargor has lost where there is a failure to comply with Order 83 r. 3(3) is the opportunity to satisfy himself of the correctness of the amount claimed, and to challenge the figures if he is not. *A bare denial of a debt was never enough. The chargor also has an onus if he denies the amount claimed to shy how much he admits owing.* In this kind of case the dismissal of the application for non-compliance with some aspect of the rules does not extinguish the debt. The chargee can start afresh but there will then be additional costs, interest and delay.
>
> This is the very situation which Order 2 r. 1(2) of the RHC 1980 was meant to cater for. The question is whether the failure to comply with the Rules can be cured by setting aside the proceedings in whole or in part or by allowing some amendment to be made, all of which must be on such terms as to costs or otherwise as the Court thinks just.

> Citibank however has only itself to blame for the morass in which it finds itself. By the time it filed its third affidavit it was aware of the challenges being made. The fourth and last affidavits filed before the final hearing did not remedy the earlier inadequacies. It did not correctly state the amount of the advance. It did not show at what rate the interest had been calculated. This was a material omission because the chargor had expressly disputed liability to pay 14% p.a. The fourth affidavit consequently did not prove that the money claimed was due and payable.
>
> *The lesson for all concerned is that they must get the first affidavit right or face the consequences in terms of costs or even a dismissal of the proceedings if the situation has not been put right by the time the order is made.* (emphasis added)

I subscribe to his views which have also found favour with Jeffrey Tan, J in *Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd & Anor* [2000] 2 CLJ 73 at p. 83. It follows, therefore, that the failure on the part of a chargee to state all the particulars as required by O. 83 r. 3(3) of the RHC in the very first affidavit is not fatal as long as "evidence of the correct amount due has been put before the final hearing" in a further affidavit and "if no real prejudice will thereby result to the defendant."

Applying that principle of law to the facts of the present case, the court was of the view that since the amount claimed to be due and payable as of 17 August 2000 together with the detailed breakdown including the amount advanced, the amount repaid, the interest charged and in arrears and the rate of interest have been clearly stated in the plaintiff's latest further affidavit filed on 10 August 2000 (encl. 56A) the provisions of O. 83 r. 3(3) of the RHC have been duly complied with by the plaintiff. The defendant on the other hand has only made a bare denial of the debt and it has not discharged the onus of saying how much it admits owing. Neither has the defendant satisfied the court that it would suffer real prejudice if the plaintiff's latest further affidavit was accepted by the court.

The court was of the view that the plaintiff acted correctly when it claimed a sum of RM4,678,621.65 together with interest thereon upon the defendant's failure to pay a sum of $504,296.21 as stated in the Form 16D notice and the disparity in the two amounts is allowed by s. 254(3)(a) of the NLC.

In *Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd.* [1997] 1 CLJ 590 there was a dispute as to the accuracy of the amount owed and whether the court could grant an order for sale based on the conclusive evidence clause in the charge annexure. The learned plaintiff's counsel had submitted that if the defendant had seriously contended that the amount was

incorrect the defendant should have filed an affidavit-in-reply both in respect of the alleged errors and the different rates of interest which were never ventilated in the court below. He then relied on cl. 14 of the charge annexure in support of his submission that the figure in Form 16D was conclusive. Clause 14 provides as follows:

> If and when the said account or accounts shall be closed pursuant to cl. 13 and a balance shall then be owing to the chargee by the Borrower, the chargor or its legal representatives or successors in title or assigns as the case may be, shall so long as the same or any part thereof shall remain owing and notwithstanding the chargee having obtained an order of sale under the National Land Code, pay to the chargee interest thereon at the rate prevailing at the date that the said account or accounts are closed, with monthly rests, computed from the time when such balance shall have been ascertained and the chargor agrees that the statement of the manager, assistant manager, accountant or other officer of the chargee as to the amount of such balance shall be final and conclusive.

The learned Judicial Commissioner in the court of first instance had considered himself bound by the decision of the Supreme Court in the case of *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 and had accepted this submission of the learned plaintiff's counsel. His view was shared by the Court of Appeal which then went on to dismiss the defendant's appeal and confirm the decision of the learned Judicial Commissioner. Abu Mansor, JCA (as he then was) in delivering the decision of the court said as follows at p. 344:

> Touching on the merit of the complaint, we have no hesitation in saying that the ground was without merit. *We hold that the conclusive evidence clause applies and therefore there was no need for the plaintiff to prove the amount.* All the plaintiff had to show in order to obtain an order for sale in foreclosure was the fact of the inability of the defendant to settle the loan. *As to the allegation of the defendant that the plaintiff's account had been incorrect, following Kandiah's case again, this issue must be regarded as irrelevant.* If, as alleged by the defendant, there is a discrepancy in the conclusive evidence clause, it can only be resolved in a separate claim by him but to go outside the principle of the conclusive evidence clause, we hold, is to negate the principle in *Kandiah*'s case. (emphasis added).

Similarly here, there is a conclusive evidence clause, ie, cl. 44, in the charge annexure, which provides as follows:

> **STATEMENT BY THE CHARGEE**
>
> 44. If and when the loan facility shall be withdrawn, revoked and or the said account or accounts whatsoever in respect thereof shall be closed a statement by the Director General Manager Manager Assistant Manager Sub-Manager Secretary or any other duly authorised Officer of the Chargee for the time being as to the amount of such balance and the

money and liability for the time being incurred or due to the Chargee by or from the Chargor(s) shall be accepted by the Chargor(s) or any person or persons deriving title from the Chargor(s) or the successors in title and assigns of the Chargor(s) as final and conclusive for all purposes whatsoever including for purposes of legal proceedings.

In the light of the decided cases cited above and in the absence of any affidavit-in-reply filed by the defendant to challenge the amount outstanding in the plaintiff's latest affidavit filed on 10 August 2000 (encl. 56A) I found this issue to be without merits.

The court was, therefore, satisfied that this issue did not constitute "cause to the contrary".

Invalidity Of The Said Charge

The defendant has said that the said charge is null and void and unenforceable because of three grounds. The first is that there is misrepresentation by the plaintiff. The second is that the said charge contravenes s. 67 of the Companies Act 1965. The third is that the defendant is not empowered by its memorandum or articles of association to execute the said charge being a third party charge.

Misrepresentation

The defendant has alleged misrepresentation in para. 8 of the "points of claim" which is reproduced substantially in para. (i) above. In response, the plaintiff in its affidavit-in-reply (encl. 33) has said that there are no merits in this allegation. The court was of the view that this bare allegation did not constitute "cause to the contrary" because for misrepresentation to apply under s. 340(2)(a) of the NLC the defendant must show that the misrepresentation was fraudulent and that it arose before the said charge was executed (See *T*eo Keang Sood & Khaw Lake Tee *Land Law In Malaysia – Cases and Commentary* 2nd edn., 1995, at p. 168). As the allegation stood there was insufficient material before the court to enable the court to make a ruling in favour of the defendant unlike in the cases of *Loke Yew v. Port Sweetenham Rubber Company* [1913] AC 491 and *Datuk Jaginder Singh & Ors v. Tara Rajaratnam* [1983] 2 MLJ 196. Consequently, the court found that it did not constitute "cause to the contrary".

Contravention Of Section 67 Of The Companies Act 1965

The defendant has alleged that the said charge is null and void because it contravenes s. 67 of the Companies Act 1965 since both the plaintiff and the defendant knew that a part of the loan was to be used to finance the purchase of shares in the defendant by two major shareholders of the borrower, ie Poh Leong (M) Sdn. Bhd. and Hock Sing Enterprise Sdn. Bhd. To this the plaintiff

has in para 7 of his affidavit-in-reply (encl. 33) replied that the defendant was trying to confuse the court by bringing in irrelevant issues in the hope of obstructing the plaintiff's application.

Since the defendant has filed a separate action *vide* Civil Suit No. 22-251-92 for a declaration that the said charge is null and void because it contravenes s. 67 of the Companies Act 1965 the court is of the view that the issue should be left to the trial judge in Civil Suit No. 22-251-92 to decide.

As far as s. 256(3) of the NLC read together with s. 340(2)(b) of the NLC is concerned the court was of the view that the said charge is a valid and enforceable instrument because there is nothing stated in the said charge nor the charge annexure that a part of the loan is to be utilised to finance the purchase of shares in the defendant. The plaintiff has also denied any knowledge of this. The court is further of the view that in line with the decision of the Supreme Court in the *Kandiah Peter* case *(supra)* the court in this case should not go into the merits of the defendant's allegation as he could ventilate it in Civil Suit No. 22-251-92.

I dealt next with the issue whether assuming it is true that a part of the loan was to be used to enable the two majority shareholders of the borrower to purchase shares in the defendant did it automatically mean that the said charge was null and void and unenforceable under s. 344(2)(b) of the NLC? Upon going through the cases I found that Abdul Hamid Mohamad, J (as he then was) in *Perumahan Wira Seberang Sdn Bhd v. Hong Leong Finance Bhd* [1999] 3 CLJ 56 on the authority of the Federal Court's decision in *Co-operative Central Bank Ltd. (in receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300 has expressed the view *(obiter dicta)* that even if the loan transaction in that case infringed s. 67 of the Companies Act 1965 the charge is saved by s. 67(6) and that s. 67(6) is wide enough to allow any person to recover the amount of any loan made in contravention of s. 67. I share his views. It follows, therefore, that the plaintiff in this case was not prohibited from enforcing the said charge by way of foreclosure proceedings against the defendant and that, therefore, this allegation, even if true, did not constitute "cause to the contrary" so as to defeat the plaintiff's application for an order for sale of the said lands.

It is to be noted that on the facts in the *Perumahan Wira* case *(supra)* the High Court had found that the loan transaction did not contravene s. 67 of the Companies Act 1965. However, in the *Feyen Development* case *(supra)* based on the facts the Federal Court had accepted that the charge was in breach of s. 133(1) of the Companies Act (which is equivalent to s. 67(1)). Nevertheless, it held that "no civil consequence flowed therefrom, that is to say, no voidness or unenforcealibility attached to the loan or the charge

transactions regard being had to the context and purpose of s. 133(1), and especially the principle underlying s. 133(5)".

The Federal Court also disapproved of the decision in the case of *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd* [1990] 2 CLJ 35; [1990] 1 CLJ (Rep) 702 where NH Chan, J (as he then was) had held that the third party charge "was illegal and therefore void and unenforceable by the co-operative society as it had contravened the prohibition of s. 133 of the Companies Act 1965."

Said Charge *Ultra Vires* The Defendant's Memorandum And Articles Of Association

I find that this is a bare assertion because no attempt was made by counsel for the defendant to submit in detail by references to the facts, the law and decided cases, if any. Nevertheless, since it has been raised it then became the duty of the court to determine whether it constituted "cause to the contrary".

The court, accordingly, perused the defendant's memorandum of association (exh. "TLH5", encl. 31) and found that para 3(5) read together with para 3(44) which sets out the objects for which the defendant is established clearly authorises the defendant to execute the said charge.

The two paras read as follows:

> 3(5) To guarantee or become liable for the payment of money or for the performance of any obligations and generally to transact all kinds of guarantee business and for the aforesaid business to charge mortgage all in as part of the property held as security and also to transact any kinds of agency business.
>
> (44) Generally to do all such General other things as are incidental to or connected with any of the above objects or conducive to the attainment thereof or otherwise likely in any respect to be advantagous to the company.
>
> The objects specified in each of the paragraphs in this Memorandum shall be regarded as independent objects, and accordingly shall be in no (way) limited or restricted (except when otherwise expressed in such paragraph), by reference to the objects indicated in any other paragraph or name of the company, but may be carried out in as full ample a manner and construed in as wide a sense as if each of the said paragraphs defined the objects of a separate, distinct and independent company.

As was said by Gopal Sri Ram, JCA in the *Low Lee Lian* case *(supra)* when stating the facts relevant to the appeal in that case, at p. 42:

> The appellant is the registered proprietor of all that land held under HS(D) 2974 for Lot No. 11041 in the Mukim of Sungei Buloh ('the said land'). On 2 October 1985, she executed a charge over the said land in favour of the respondent to secure a loan of RM600,000 granted by the respondent bank ('the bank') to one Zinger Feedmill Sdn Bhd ('the borrower'). *This is commonly known among the members of the legal profession as a 'third party charge'. It denotes a charge by a registered proprietor over his land to secure a loan made by the lender to a third party. As correctly submitted by counsel, it is nothing more than a secured guarantee.* (emphasis added).

A *fortiori*, the court found that this allegation of the defendant did not constitute "cause to the contrary".

Breaches Of The Said Charge

On the issue whether the defendant's allegations of the breaches of the said charge by the plaintiff constitute "cause to the contrary", the court was of the view that in line with the *ratio decidendi* of the Federal Court in the *Low Lee Lian* case *(supra)*, it should not enter upon a discussion of the issue to determine whether the allegations have or are devoid of any merit because s. 256(3) of the NLC must be read narrowly. It is open to the defendant to bring a separate action *in personam* for the alleged breaches of contract against the plaintiff.

The relevant excerpt from the *Low Lee Lian* case *(supra)* on pp. 51 and 52 reads as follows:

> Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. *An application under s. 256 is opposed by the chargor on the ground that the chargee has acted in breach of contract, eg by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s. 256(3) and the authorities which have considered the section, constitute cause to the contrary.* He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s. 256 to properly appreciate their true role assigned to them by Parliament.
>
> *We have said that s. 256(3) must be read narrowly.* It does not, however, follow from this that the chargor who is unable to satisfy the court of cause to the contrary is left without any remedy whatsoever. *Allegations that fail to amount to cause to the contrary may, as observed earlier, nevertheless form the basis of an action in personam against the chargee.*

> Take the facts of this very case. Based upon what we have said thus far, it is clear that the instant appellant failed to meet the requisite legal test of what amounts to a cause to the contrary. The judge therefore quite correctly made the order for sale. (emphasis added)

In the *Kandiah Peter* case *(supra)*, the Supreme Court reiterated the principle which it had laid down earlier in *Malaysian International Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193 that an order for sale made pursuant to s. 256 of the NLC is not a judgment debt because the claim of the chargee was not a covenant but was in exercise of its statutory remedy against the chargor in default under the registered charge in accordance with the provisions of the NLC. His Lordship, Mohd Eusoff bin Chin, SCJ (as he then was) who delivered the judgment of the Supreme Court, therefore, held that the making of an order for sale upon the failure of a chargor to satisfy the court that there existed "cause to the contrary" did not bar a subsequent action *in personam* against the chargee (notwithstanding that an order for sale has been made) based upon the same or similar facts and issues that did not avail him in opposing the application under s. 256 of the NLC because the court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. Further, neither *res judicata* nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

In view of the above, I granted the order for sale of the said lands excluding the interests of the borrower and the first and second interveners together with costs.